Unlike the plaintiff, the defendant's accounts as maintained and prepared by DW2 have not been audited. If this had been done, the defendant would have discovered that there are discrepancies in the accounts prepared by DW2. As examples, I refer to AF39 wherein DW2 has recorded the price of the rubber purchased pursuant to Form G 364 to be RM6,085.56. Form G 364 is AB52 for which DW2 has earlier acknowledged the purchase price to be RM6,436.65. Likewise AF46 gives the purchase price as RM3,715.60. The relevant Form G 405 at AB54 shows a different figure, RM4,399.42. Again AF51 states the total purchase price to be RM6,165. The corresponding Form G 438 which is AB58 indicates a total sum of RM6,658.20. I stress here again that Form G is the defendant's own document signed by DW2 and yet particulars of the same transaction maintained by DW2 in some other account book differs from the very invoice evidencing the purchase.

Unlike the plaintiff, the defendant had come out openly to declare that DW2 had been dishonest, had mismanaged the defendant's business, breached the trust entrusted to him and had maintained irregular accounts of all transactions with the plaintiff. It is for this reason that I cannot in the absence of conclusive evidence accept PW2's involvement of any fraudulent dealings spearheaded by DW2 and for that matter place much reliance to PW2's purported admission of guilt in his letter dated 10 December 1983, AF62, which PW2 denies have been signed by him. The defendant had also admitted that although AF62 is directed to the plaintiff, the plaintiff never received it as he had kept it in his safe.

On the evidence adduced, particularly on the admissions of indebtedness appearing at AB29-35, I find that the defendant had not succeeded in proving that his accounts with the plaintiff had been settled in full. On the contrary, there is still a balance owing out of the total sales of RM1,413,549.63 which has been agreed to by the parties. Since the plaintiff have acknowledged receiving only RM942,185.41 including the RM850,050.47 which is supported by the 183 crossed cheques, there will be judgment entered for the plaintiff for the sum of RM471,364.22, interest at 8% per annum from the date of filing of this suit to date of realisation, and costs.

YAP NYO NYOK @ YAP YOON JIN (F)

v.

BATH PHARMACY SDN. BHD.

HIGH COURT, KUCHING
DATUK CHONG SIEW FAI J.
[CIVIL APPEAL NO. KG. 27 OF 1991]
27 APRIL 1993

LANDLORD AND TENANT: Sublease - For a fixed term - Subsequent sale of property - Whether purchaser entitled to terminate sublease before expiry of full term - Whether notice to quit reasonable and good in law.

PRACTICE AND PROCEDURE: Pleadings - Statement of claim - Plaintiff relying on implied term - Facts relating to implied term not pleaded - No evidence adduced on the implied term - Whether plaintiff entitled to raise the issue in his submission.

The defendant and the administratrix of the estate of the deceased owner of the property entered into a agreement whereby the property was sublet to the defendant for a fixed term of 10 years commencing 16 August 1988. The administratrix subsequently sold the property to the plaintiff who took it with notice of the sublease. The plaintiff served a three month notice to quit on the defendant and claimed for possession of the property and for damages for alleged trespass.

The plaintiff appealed against the decision of the trial Magistrate answering the following points of law in the negative:

(a) whether the plaintiff is entitled to prematurely terminate the sublease before its term has fully expired relying upon the provisions of clause 4 of the agreement; and
(b) whether the notice to quit dated 27 December 1989 served by the plaintiff on the defendant is reasonable and good in law.

Held:

[1] Where a plaintiff's claim rests on an implied term, as in the instant case, the proper practice is to allege such implied term or agreement as a fact, setting out the basis upon which the implied term is said to have arisen. All facts that are essential to constitute a cause of action must be alleged. The plaintiff had not pleaded material facts necessary to support his claim for possession and

trespass and on that ground alone the application ought not to have been allowed to be proceeded with.

[2] Clause 4 of the agreement must be construed according to the intent of the parties.The express words used in the clause must be given their natural ordinary meaning unless it appears from the context that by so doing they are being used in a sense different from that in which the parties intended to use them or unless by so using them a manifest inconsistentcy results which could not have been the intention of the parties. In its natural and ordinary meaning the wording in clause 4 does not create or confer an option exercisable by the plaintiff to terminate the sublease before expiration of the fixed term.

[3] The term "sooner determination" in clause 9 of the agreement cover situations where conditions or covenants in the sublease provide for determination of the sublease during its currency and they did not import or create an implied condition or covenant for the plaintiff to determine the tenancy before the expiration of the fixed term.

[4] Where a tenancy is created for a fixed term, the tenancy is for the fixed term. If it is intended that there be an option for one or either of the parties to terminate the tenancy before the expiration of the term created the option is normally expressly provided and it was not for the Court to imply covenants or stipulations which might and ought to have been expressed if intended.

[5] Clause 4 was capable of being effective and subsisting without the need of incorporating the implied covenant of the sublessor to determine the sublease during its currency and the test of "necessary for business efficacy" did not nessitate the suggested covenant in favour of the sublessor to be implied by reason of the existence of clause 4. The covenant ought not to be implied.

[6] The onus was on the plaintiff to establish that the length of the notice to quit of three months was sufficient. The plaintiff at all material times had knowledge of the previous arrangement of the 10 year tenancy between her predecessor and the defendant. There was uncontroverted evidence that the defendant had expended a considerable sum of money in renovating the shophouse. In the circumstances the three months notice to quit was inadequate and incapable of determining the sublease.

[Appeal dismissed with costs].

Cases referred to:
Philipps v. Philipps [1878] 4 QBD 127 ***(foll)***
Bruce v. Odhams Press Ltd. [1936] 1 AER 287 ***(foll)***
Smith v. Harwich (Mayor) [1857] 2 CB (NS) 651 ***(refd)***
In re Berker Sportcraft Ltd.'s Agreements [1947] 177 LT 420 @ 427-428 ***(refd)***
Reigate v. Union Manufacturing Co. [1918] 1 KB 592 at 605 ***(foll)***
Re Comptoire Commercial Anversois v. Power Sdn. Bhd. Co. [1920] 1 KB 868 ***(foll)***
Liverpool City Council v. Irwin [1977] AC 239 ***(foll)***
BP Refinery v. Shire of Hastings [1977] 16 ALR 363 PC ***(foll)***
Pasaraya Seri Sayang Sdn. Bhd. v. Majlis Perbandaran Pulau Pinang [1988] 3 MLJ 51 / [1988] 2 CLJ 99 ***(dist)***

Legislation referred to:
Sale and Purchase Agreement
Subordinate Courts Act 1948, ss. 69, 93(1)
Subordinate Courts Rules 1980, O. 14 r. 13, 21(1)(a)

For the plaintiff - P.S. Lai; M/s. Tan & Lai
For the defendant - P. Phang; M/s. Reddi & Co.

JUDGMENT

Chong Siew Fai J:
This appeal by the plaintiff is against the decision of the Magistrates' Court at Kuching answering in the negative, the following 2 points of law raised in Summons No. M/CIV/288/90/C. The 2 points are:

(a) whether the plaintiff is entitled to prematurely terminate the sublease before its term has fully expired; and
(b) whether the notice to quit dated the 27 December 1989 served by the plaintiff on the defendant is reasonable and good in law.

The undisputed facts as disclosed in the pleadings and the affidavits filed constituting the background of the case may be summarised as follows:

1. Initially the shophouse, the subject-matter of the sublease, belonged to one Chong Tze Yew.
2. Chong Tze Yew died, and his wife, Tan Soi Lui became the administratrix of his estate.

3. As the administratrix, Tan Soi Lui and the defendant entered into 2 deeds both dated 12 May 1988 whereby, *inter alia*, Tan agreed to sublet the shophouse to the defendant for a term of 10 years commencing from 16 August 1988 to 15 August 1998 at the monthly rental of RM1,000 for the first 5 years and RM1,250 for the remaining 5 years. Meanwhile Tan, as the administratrix, also entered into a sub-lease with the defendant for subletting the shophouse for the term of 10 years and the rentals as aforesaid. The sublease was not registered with the Land Office because of the existence of 2 caveats, which also hindered the registration of the application for transmission of the shophouse to Tan. This unregistered sublease contained substantially terms and conditions found in one of the 2 deeds above-mentioned.
4. The defendant entered into possession as tenant of the shophouse on 16 August 1988.
5. Tan passed away, and one Joseph Chong Vui Chiung @ Chong Kueh Ming was appointed administrator *De-bonis Non* of the estate of Chong Tze Yew on 15 March 1989.
6. By a Memorandum of Sublease dated 15 May 1989 the said Joseph Chong as registered owner of the shophouse by virtue of his representative capacity sublet the shophouse to the defendant for the remaining term of 9 years and 3 months (that is out of the 10 year term) from 16 May 1989 to 15 August 1998 at the same rentals as previously agreed. This sublease was registered at the Kuching Land Office on 11 December 1989 as Instrument L16031/1989 with the consent of the plaintiff as caveator who had lodged a caveat against the shophouse.
7. On 30 May 1989 the plaintiff and the said Joseph Chong, as the administrator, entered into an agreement for the sale of the shophouse to the plaintiff subject to the defendant's tenancy. In the agreement the plaintiff acknowledged notice of the defendant's tenancy for 10 years and undertook not to terminate it prior to its expiry date on 31 August 1998.
8. The memorandum of sublease was registered first, in point of time, as instrument L16031/1989 before the registration of the memorandum of transfer of the shophouse to the plaintiff in pursuance of the sale and purchase agreement (see paragraph 5 of Wong Sie Sing's affidavit affirmed on 5 July 1991).
9. On 30 April 1990 the plaintiff instituted the action presently under appeal based on a 3-month notice to quit dated 27 December 1989.

I would first make an observation on the statement of claim. In my opinion, the pleading, as it stands, is, putting it mildly, unsatisfactory. So far as is relevant, O. 14 r. 13 of the Subordinate Courts Rules 1980 provides:

> (1) ... every pleading must contain, and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim ... but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.
> (2) Without prejudice to paragraph (1), the effect of any document ... referred to in the pleading must, if material, be briefly stated, and the precise words of the document ... shall not be stated, except in so far as those words are themselves material.

Thus, a statement of claim must contain all matters necessary to support the claims in an action.

In the instant case under appeal, the claims are, *inter alia*, for possession of the shophouse and for damages for alleged trespass. The statement of claim acknowledged the sublease for a fixed term of 9 years and 3 months commencing from 16 May 1989 (thus ending on 15 August 1998) and avers the giving of a notice to quit dated 27 December 1989 to deliver up possession of the shophouse "on or before 31 March 1989 or at the end of the next complete calender month of the tenancy after the service of the said notice on the defendant" and the service of the said notice was on 29 December 1989. None of the other clauses or provisions of the sublease was pleaded. And it was only during the hearing of the present application in the lower Court that Counsel for the plaintiff revealed for the first time that the plaintiff relied on an implied term alleged to arise under the sublease. Where a plaintiff's case rests on an implied term (e.g. an implied term of option to prematurely determine a

contract or sublease, as in the instant case), the proper practice is to allege such implied term or agreement as a fact, setting out the basis upon which the implied term is said to have arisen. All facts that are essential to constitute a cause of action must be alleged. In *Philipps v. Philipps* [1878] 4 QBD 127 Cotton LJ stated the general rule as follows:

> But in my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial. (page 139)

And, in *Bruce v. Odhams Press Ltd.* [1936] 1 AER 287 at page 294 Scott LJ said:

> The word 'material' means necessary for the purpose of formulating a complete cause of action; and if any one 'material' statement is omitted, the statement of claim is bad.

Each party must plead all the material facts on which he means to rely at the trial.

In the instant case the plaintiff has not pleaded material necessary to support his claim for possession and trespass.

On the face of the matters, standing alone, as pleaded in the statement of claim, it appears to me gravely in doubt if the pleading could stand had O. 14 r. 21(1)(a) of the Subordinate Courts Rules 1980 been resorted to.

It is, however, noted that no objection was taken by the defendant on the above basis.

But even then, I do not think the plaintiff should have been allowed to raise in his submission, any point or matter which is essential to his claim in the action and has not been pleaded, and respecting which no evidence has been adduced. In fact I do not think he could be permitted to adduce any evidence of such unpleaded matter if he had attempted to. As Brett LJ said in *Philipps v. Philipps, supra*, (at page 133):

> If parties were held strictly to their pleadings under the present system, they ought not to be allowed to prove at the trial, as a fact on which they would have to rely in order to support their case, any fact which is not stated in the pleadings.

On the above ground alone, the application ought, in my judgment, not to have been allowed to be proceeded with.

Assuming my above view is wrong, I now proceed to consider the 2 preliminary questions raised.

At the commencement of the hearing before me, the defendant abandoned his counter claim for declaratory relief. The declaratory decrees sought ran counter to the substantial claim of the plaintiff and were beyond the jurisdiction of the Magistrates' Court (see s. 93(1) read with s. 69 of the Subordinate Courts Act 1948). And there is no indication that the defendant will not subsequently have the counterclaims transferred to the High Court for trial. This is another ground that the applications ought not to have been allowed to proceed.

As regards the 2 preliminary questions raised:

1. Is the plaintiff entitled to prematurely terminate the sublease before its term has fully expired?

As already pointed out, the sublease is for a fixed term of 9 years and 3 months from 16 May 1989 to 15 August 1998. Then there are the following covenants and agreed provisions:

(a) Covenant by the sublessor for quiet enjoyment which runs as follows:

> That the sublessee punctually paying the rent hereby reserved and performing and observing the several covenants and stipulations on the sublessee's part herein contained shall peacefully hold and enjoy the demised premises during the term hereby created without any interruption by the sublessor or any person rightfully claiming under or in trust for the sublessor. (Clause 1 of part II of the sublease).

(b) IV. Provided Always And It Is Hereby Mutually Agreed as follows:

1. ...

2. In case the demised premises or any part thereof shall at any time during the term hereby granted be destroyed or damaged by fire explosion or any other cause beyond the control of the sublessee so as to be unfit for occupation or use, then and in every such case the sublessor, if the sublessor thinks fit, shall be at liberty by notice in writing to determine the term hereby granted and upon such notice being given the term hereby granted shall absolutely cease and determine.

3. ...

4. In the event the sublessor terminating this sublease before its term has fully expired and the sublessee not being in breach of any of the terms of and conditions of this sublease, then the sublessor shall compensate the sublessee for all the losses he may have suffered as a result of the termination, except the loss of future earning from business.

As to the construction of the said clause 4, I agree that it must be construed according to the intent of the parties. By intent, however, is meant the intention which is expressed by the meaning of the words used in the sublease and is not what it may be supposed that the parties wished to effect. The express words used in the clause must be given their natural ordinary meaning unless it appears from the context that by so doing they are being used in a sense different from that in which the parties intended to use them., or unless, by so using them, a manifest inconsistency results which could not have been the intention of the parties. It is not disputed that in its natural and ordinary meaning, the wording in the said clause 4 does not expressly create or confer an option exercisable by the sublessor (plaintiff). It is a mere consequential provision which will be applicable upon termination of the sublease by the plaintiff (sublessor) before the expiration of term. It contains no express option exercisable by the plaintiff.

For the plaintiff it was firstly contended that from the words "sooner determination of this sublease" in clause 9 of Part II of the sublease, there should be implied a clause permitting the sublessor to determine the sublease before the expiration of the fixed term. With respect, I am unable to agree. Clause 9 is a covenant to yield up the shophouse. It reads:

> At the expiration or sooner determination of this sublease to yield up the demised premises to the sublessor in such good and reasonable repair as shall be in accordance with the covenants of the sublessee hereinbefore contained.

In my opinion, The words "sooner determination" cover situations where conditions or covenants in the sublease provide for determination of the sublease during its currency; they, in themselves, do not import or create an implied condition or convenant for the sublessor to determine the tenancy before the expiration of the fixed term.

Next, it was submitted that to give business efficacy to the said clause 4 and to render it workable, the Court must and it was reasonable and equitable to imply the term for pretermination having regard to the sublease as a whole, and more particularly the said clause 4 which provides compensation to the sublessee.

Where a tenancy is created for a fixed term, the tenancy is for the fixed term. If it is intended that there be an option for one or either of the parties to terminate the tenancy before the expiration of the term created the option is normally expressly provided. It is not for the Courts to imply convenants or stipulations which might and ought to have been expressed if intended. As stated in *Smith v. Harwich* (*Mayor*) [1857] 2 CB (NS) 651:

> ... it is not competent to the Court to make a contract for the parties which they have not though fit to make for themselves, or to import a covenant which does not arise by fair and necessary implication from the language they have used. (669)

Generally speaking, parties to a contract are taken to have incorporated therein all terms and conditions which they wanted. And, where an agreement already contains terms for termination, during the currency of the agreement, the *onus* lies on the person (the plaintiff in our instant case) who contends that a further such term ought to be implied, and it will be difficult in such a situation to imply further such a term. See, for example, *In re Berker Sportcraft Ltd.'s Agreements* [1947] 177 LT 420 @ 427-428.

In our present case, should a covenant for the termination of the sublease before the expiration of the fixed term as suggested by the plaintiff be implied?

In *Reigate v. Union Manufacturing Co.* [1918] 1 KB 592 at 605, Scrutton LJ said:

> The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term

> can only be implied if it is necessary in the business sense to give efficacy to the contract; that is; if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, "What will happen in such a case," they would both have replied, "Of course, so and so will happen; we did not trouble to say that, it is too clear". Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.

In other words a term cannot be implied unless the parties must necessarily have intended it such that both would have answered "Oh of course" to an officious bystander had he suggested it in negotiation.

In *Re Comptoire Commercial Anversois v. Power Son and Co.* [1920] 1 KB 868 Scrutton LJ remarked:

> The court ... ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted. (Pg. 899-890).

In *Liverpool City Council v. Irwin* [1977] AC 239 Lord Wilberforce said:

> In my opinion such obligation should be read into the contract as the nature of the contract itself implicitly requires, no more or less: a test, in other words of necessity. (Pg. 254).

And, Lord Edmund-Davies said:

> The touchstone is always necessity and not merely reasonableness. (Pg. 266).

A more concise statement of law on the subject was propounded in *BP Refinery v. Shire of Hastings* [1977] 16 ALR 363 PC where Lord Simon of Glaisdale delivering the opinion of the Board said (@ 376):

> ... for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

Thus, for a term to be implied in a contract, it must be both necessary to give business efficacy to the contract and obvious.

In the instant case under appeal, Clause 4 provides: "In the event the sublessor terminating this sublease before its term has fully expired and the sublessee not being in breach of any of the terms of and conditions of this sublease", compensation for losses shall be paid by the sublessor (with certain exception). But it does not specify the circumstances under which the sublessor may terminate the sublease. Now applying the test of business efficacy, is it really necessary to imply the term of an option enabling the sublessor to determine the tenancy before the expiration of the fixed term because of the above -quoted wording in Clause 4 that is "In the event the sublessor ... and conditions of this sublease"? For this purpose, the whole sublease has to be looked into, particularly, in my mind, Clause 2 of Part IV of the sublease. The said Clause 2 permits the sublessor to determine the sublease by notice on the happening of certain events (that is destruction or damage of the shophouse or any part thereof by fire explosion or **any other cause beyond the control of the sublessee** thereby rendering the shophouse unfit for occupation or use). Like Clause 4, Clause 2 clearly contemplates situations or causes respecting which the sublessee is not at fault or in breach. However, Clause 2 gives no remedial or compensa-tory provisions. In other words, whereas Clause 4 stipulates compensatory provisions to the sublessee in the event of the sublessor terminating the sublease before the fixed term, without **specifying the circumstances under which the sublessor may terminate the sublease**, Clause 2, on the other hand, sets out circumstances under which the sub-lessor may terminate the sublease by notice before expiration of the fixed term, but without reserving or containing any provisions for rights and remedies of either party.

In the circumstances, having regard to the clauses, can it be said with any reasonable certainty that there can be no doubt of the nece-ssity for business efficacy to imply an

option exercisable by the sublessor to determine the tenancy before the contractual fixed period? I do not think so. For example, the shophouse may be destroyed or damaged rendering it unfit for occupation or use by a cause that is beyond the control of the sublessee but attri-butable to the fault of the sublessor in which event Clause 4 may become applicable. Had Clause 2 itself contained express provisions on remedies, there would have been a more probable case for rendering Clause 4 separable from Clause 2; but that is not the case. The phrase "In the event the sublessor termina ting ... and the sublessee not being in breach of any of the terms and conditions of this sublease", in Clause 4 may well fit into situations (though not necessarily all situations) where the sublease is terminated thereby bringing the said Clause 4 into operation.

In my judgment, Clause 4 is capable of being effective and subsisting without the need of incorporating the implied covenant of the sublessor to determine the sublease during its currency and the test of "necessary for business efficacy" does not necessitate the suggested covenant in favour of the sublessor to be im- plied by reason of the existence of Clause 4. The covenant ought not to be implied.

It was pointed out that the 'compensatory' provisions (Clauses 3 and 4) were bilateral. That, of course, is a factor to take into account together with all other relevant clauses in the sublease. However, the issue before the Court is the implication of the option for the sublessor to determine the tenancy during its currency. The inter-relation of Clauses 2 and 4 as stated above, in my opinion, outweighs the existence of the said Clause 3 in considering the issue aforesaid.

As regards the 2nd preliminary point of whether the Notice To Quit dated 27 December 1989 is reasonable and good in law, in the view that I hold of the 1st preliminary point, that is, that no option to prematurely terminate the sublease before its term has fully expired is to be implied from the said Clause 4, the said notice to quit was inoperative in law and did not terminate the sublease in this case.

But assuming my conclusion on the first point is wrong, the onus lies on the plaintiff to establish that the length of the notice to quit of 3 months is sufficient. For the plaintiff, Counsel relied on *Pasaraya Seri Sayang Sdn. Bhd. v. Majlis Perbandaran Pulau Pinang* [1988] 3 MLJ 51. There, the facts are different; the tenant failed to pay rental even after notice and the question of forfeiture arose. I do not think the point therein decided is applicable in the instant case. In our present case, the sublease is for a fixed term of 9 years and 3 months. The plaintiff at all material times had knowledge of the previous arrangement of the 10 year tenancy between her predecessor and the defendant. There is uncontroverted evidence that the defendant had expended a considerable sum of money in renovating the shophouse which was rented to run the business of a pharmacy (paragraph 13 and 15 of Wong Sie Sing's affidavit made on 5 July 1991 - page 86 of the Appeal Record). In the circumstances, I am of the view that the 3 months' notice to quit is inadequate and incapable of determining the sublease.

For the above reasons which are different from that of the learned trial Magistrate, I dismiss the appeal with costs to the defendant/respondent. In the absence of an agreement, such costs are to be taxed.